BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARC A. THOMAS Claimant	)	
VS.	)	
SMART PORTABLE STORAGE, LLC Uninsured Respondent	)	Docket No. 1,041,773
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant requests review of the February 6, 2012, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on May 16, 2012. E. Thomas Pyle, III, of McPherson, Kansas, appeared for claimant. Jeffrey E. King, of Salina, Kansas, appeared for the uninsured respondent. Norman R. Kelly, of Salina, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The Administrative Law Judge (ALJ) found that respondent had insufficient payroll to bring the parties within the coverage of the Kansas Workers Compensation Act (Act), and therefore denied claimant's request for benefits.

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues that the parties are covered under the Act because respondent reasonably estimated an annual payroll in excess of $20,000 for the 2008 calender year, the year in which claimant was injured. In the event the Board finds the parties are covered under the Act, claimant contends the Board should find that he was respondent's

employee or statutory employee; that his minimum average weekly wage was $480; that he is entitled to temporary total disability benefits from July 29, 2008, until March 31, 2010; that he is entitled to have his medical bills paid as authorized treatment; that he has a 29 percent permanent functional impairment to the whole body; that he has an 80 percent work disability, based on a 100 percent wage loss and a 60 percent task loss; that he is essentially and realistically unemployable; and that he is accordingly entitled to compensation based on permanent total disability benefits.

Respondent and the Fund urge the Board to find that respondent did not reasonably anticipate, nor did it have, a payroll in excess of $20,000 in 2008 and that this claim should consequently be dismissed for lack of jurisdiction pursuant to K.S.A. 44-505(a).

The issue for the Board's review is: Are the parties covered by the Act pursuant to K.S.A. 44-505?

FINDINGS OF FACT

Respondent was formed in 2007, originally as a partnership, with Martin Simpson owning a 60 percent interest and Steve Lorson owning 40 percent. There is no dispute that in calendar year 2007, the partnership had no payroll. The business was converted to a limited liability company (LLC)[1] in March 2008, with Mr. Simpson and Mr. Lorson being the only two members.[2] The official certification of respondent's LLC status was issued by the Kansas Secretary of State's office on April 21, 2008.[3] The respective interests in the LLC remained at 60 percent for Marty Simpson and 40 percent for Steven Lorson.

Respondent's business involved the storage of personal property of its customers in plastic storage units located in a warehouse. Respondent also loaded the storage units on a truck or semi and either took the units to the warehouse or otherwise transported the units as directed by the customers. At times, respondent would assist in loading or unloading the contents of the plastic units. Under the arrangements initially contemplated by Mr. Simpson and Mr. Lorson, Mr. Simpson was to handle the financial end of the business and Mr. Lorson was to perform the labor. Mr. Simpson and Mr. Lorson testified that respondent was set up so it would not have any full time employees and if workers were needed, they would be hired as "contract labor" on an as-needed basis.

Claimant testified he was hired in April 2008 to drive trucks, both a semi and a smaller vehicle; perform mechanic work; and do some sales and public relations duties.

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[1] See the Kansas Revised Limited Liability Company Act, K.S.A. 17-7662 *et. seq*.

[2] Pursuant to K.S.A. 17-7663(l), the status of both Mr. Simpson and Mr. Lorson vis-a-vis the LLC is "member."

[3] Steven Joseph Lorson depo. (October 28, 2008), Ex. 1.

Claimant testified he was hired as a full-time employee at the rate of $12 per hour. Claimant testified he was expected to work 40 hours a week or more, and that he received time and a half for time worked in excess of 40 hours per week. When claimant went out of town for respondent, he was paid per diem of $100 per day. Both Mr. Simpson and Mr. Lorson denied claimant was an employee or that he was hired or expected to work 40 or more hours per week. Mr. Lorson denied claimant was paid per diem when he went out of town. When claimant was working on a job, Mr. Lorson would calculate the hours claimant worked, and claimant was paid $12 per hour. When claimant went to Arkansas, where his injury occurred, he was paid a flat fee of $500.

On July 29, 2008, claimant was in Arkansas, having taken a load for a customer from Kansas to Little Rock. On the morning of July 29, claimant was cleaning the semi's windshield in preparation for his return trip to Kansas. The nose of the semi was tilted forward, thus allowing claimant access to the windshield by standing on one of the semi's front tires. While so engaged, claimant slipped and fell backwards to the ground, landing face up. He suffered injuries to his head, neck and back. He was able to travel back to Kansas and reported the injury to Mr. Lorson the following day. Claimant sought medical treatment and eventually underwent cervical spine surgery, consisting of an anterior discectomy and fusion at C5-6 and C6-7.

Claimant directs the Board's attention to three sets of balance sheets and profit and loss statements to support his contention that respondent should reasonably have anticipated a $20,000 annual payroll in calendar year 2008:

(1) The first general journal transaction and profit & loss statement is dated January 1, 2008, through August 20, 2008. That statement shows an expense for contract labor in the amount of $16,449.53. Mr. Simpson testified that he and Mr. Lorson borrowed money from Commercial Capital Company, LLC (Commercial Capital), and from A & S Properties[4]. Mr. Simpson stated that when borrowing money from Commercial Capital, he was asked to provide financial information on himself and Mr. Lorson, as well as some financial projections for respondent. Mr. Lorson testified that the $16,449.53 figure set out on the profit & loss statement for contract labor also included other expenses, such as amounts paid for fuel.

Monte Brent testified that when he formerly worked for Commercial Capital, he had communicated with Mr. Simpson about a possible loan to respondent. Mr. Brent asked Mr. Simpson to provide information concerning the planned scope of respondent's business for the first year of its operation. Mr. Brent testified he received from Mr. Simpson the general journal transaction sheet and the profit & loss statement through August 20, 2008. Mr. Brent described those documents as being "pro forma" in nature and said they were

[4] A & S Properties is partly owned by Mr. Simpson. Other owners include Mr. Simpson's wife and Mr. Simpson's mother-in-law.

just intended to give Commercial Capital an idea of the size and scope of the respondent's business. He said the documents requested of Mr. Simpson were informal and would have been of minimal importance as to whether Commercial Capital would agree to loan funds to respondent.

Larry Rice was the manager for Commercial Capital. In the process of making a loan to respondent, Commercial Capital required respondent to provide financial statements of respondent and its members. Mr. Rice testified he was sure he glanced at the balance sheet and profit & loss statement before loaning funds to respondent, but to his recollection he did not speak with either Mr. Simpson or Mr. Lorson about the figures. He said normally in pro forma financial statements, the numbers are estimated and rounded off, however, the figures provided to Commercial Capital by respondent appeared to be actual figures. Mr. Rice could not remember if the documents were represented as pro forma in nature or not.

(2) The second set of balance sheet and profit & loss statements is dated January 1, 2008, to September 14, 2008. There is another balance sheet dated September 30, 2008. These documents were offered into evidence as an exhibit to the deposition of Mr. Simpson taken on October 28, 2008, and appear to have been printed at claimant's request. The profit & loss statement shows an expense for contract labor of $6,061.67. Mr. Simpson testified the balance sheet and profit & loss statement dated January 1, 2008, through September 14, 2008, were not financial statements but were mock-ups of how he came up with the projections provided to Commercial Capital.

(3) The third set of papers includes a balance sheet and profit & loss statement from January 2008 through December 2008. The figures on these documents show contract labor expenses being $7,567.50 for the entire 2008 calendar year. This balance sheet and profit & loss statement were provided by respondent to Thomas Pickel, respondent's accountant, for use in preparing respondent's income tax statements. Mr. Pickel testified that to his knowledge, the only amount respondent spent on wages was the $7,567.50 reflected on the balance sheet and profit & loss statement presented to him for use in preparing respondent's tax returns.

Other than reimbursement of expenses, neither Mr. Simpson nor Mr. Lorson received any income, draws, money, benefits, salaries, wages, dividends or distributions by reason of their association with Smart Portable Storage, LLC.

Claimant also relies on copies of checks and entries in respondent's check register to support his position that respondent reasonably estimated a $20,000 annual payroll in calendar year 2008. However, Mrs. Rosalie Lorson, who performed bookkeeping duties

for respondent, testified in detail regarding the checks and the check register.[5] Mrs. Lorson's testimony and a careful review of the checks, bank statements, and invoices attached to Mr. Simpson's deposition of January 19, 2011, provide a clear and reasonable explanation of virtually all the entries claimant maintains are questionable.

Both Mr. Lorson and Mr. Simpson testified that they never discussed any anticipated labor costs. When they spoke with insurance agent Lee Davis about procuring insurance for respondent, they were told that unless they anticipated paying wages in excess of $20,000 per year, respondent would not need workers compensation insurance. Because the business was set up to have no full-time employees, the decision was made by Mr. Simpson and Mr. Lorson not to purchase workers compensation insurance. Mr. Simpson and Mr. Lorson anticipated that most labor requirements involved in running the business would be performed by family members. A review of the checks issued by respondent shows that almost half of the labor expenses paid by respondent were to family members of Mr. Lorson or Mr. Simpson. Only about $4,000 was paid in labor expenses to non-family members.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden to prove coverage under the Act includes whether respondent has the requisite payroll requirements as set forth in the Act.[6] K.S.A. 44-505(a) exempts from application of the Kansas Workers Compensation Act the following:

> (2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the

[5] Mrs. Lorson's deposition is dated January 19, 2011, however, claimant's counsel advises that her testimony was actually taken on January 17, 2011. Claimant's brief at 2 (filed Mar. 15, 2012).

[6] *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 154, 613 P.2d 389 (1980).

> employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.
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> (3) any employment . . . wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection.

In order to be subject to the provisions of the Act, the above statute establishes a two-prong test. Under K.S.A. 44-505(a)(2), the employer must have had an annual payroll for the preceding calendar year greater than $20,000. Secondly, the employer must reasonably estimate that it will have a gross annual payroll for the current calendar year of more than $20,000 for all employees, excluding family members. Under K.S.A. 44-505(a)(3), if there was no payroll for the prior calendar year, then only the current calendar year is considered. In *Fetzer*,[7] the Kansas Court of Appeals interpreted the current calendar year as referring to the calendar year in which the accidental injury occurred.

In evaluating the employer's estimate of the amount of its payroll for the current calendar year, the estimate must be reasonable as to its manner and method, that is, how the estimate was done, and the time of the estimate, that is, when it was made.[8]

K.S.A. 2010 Supp. 44-542a provides:

> Each individual employer, partner, limited liability company member or self-employed person may elect to bring such employers within the provisions of the workers compensation act, by securing and keeping insured such liability in accordance with clause (1) of subsection (b) of K.S.A. 44-532, and amendments thereto. Such insurance coverage shall clearly indicate the intention of the parties to provide coverage for such employer, partner, limited liability company member or self-employed person. When such election is made, the insurance carrier or its agent shall cause to be filed with the director a written statement of election to accept thereunder so that such employer, partner, limited liability company member or self-employed person is treated as an employee for the purposes of the workers compensation act pursuant to such election. This election shall be effective until such time as such employer, partner, limited liability company member or self-employed person ceases to be insured in accordance with clause (1) of subsection (b) of K.S.A. 44-532, and amendments thereto, whereupon a written statement withdrawing such election shall be filed with the director.

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[7] See *Fetzer v. Boling*, 19 Kan. App. 2d 264, 867 P.2d 1067 (1994).

[8] *Id*. at Syl. ¶ 4.

K.A.R. 51-11-6 states:

> In computing the gross annual payroll for an employer to determine whether they are subject to the workers' compensation act, all payroll paid by that employer to all workers shall be included. The computation shall include all payroll whether or not that payroll is paid to employees in the state of Kansas or outside the state of Kansas.
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> The provision in K.S.A. 44-505 excluding the payroll of workers who are members of the employer's family shall not apply to corporate employers.
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> A corporate employer's payroll for purposes of determining whether the employer is subject to the workers' compensation act shall be determined by the total amount of payroll paid to all corporate employees even when a corporate employee has elected out of the workers' compensation act pursuant to K.S.A. 44-543.

ANALYSIS

The Board agrees with the decision of the ALJ that claimant has not sustained his burden to prove that the parties are covered by the Act. The Board further finds that the claim should be dismissed for lack of jurisdiction.

Claimant sustained personal injury by accident on July 29, 2008, at which time he had been working for respondent for approximately three months. Respondent commenced business in 2007 as a partnership with Mr. Simpson and Mr. Lorson as partners. The business became an LLC in April 2008 with two members, Mr. Simpson and Mr. Lorson. There is no evidence in the record that respondent had any payroll in 2007. Accordingly, the Board's inquiry under K.S.A. 44-505(a) must focus on the year 2008, the "current calendar year."

As noted above, neither Mr. Simpson nor Mr. Lorson received any money from respondent in calendar year 2008. Even if either had received any wage, salary, benefits, or distribution of profits or assets, such would not be considered as part of respondent's payroll. Pursuant to K.S.A. 2008 Supp. 44-508(b), "[u]nless there is a valid election in effect which has been filed as provided in K.S.A. 2008 Supp. 44-542a, and amendments thereto, such terms ["workman," "employee," or "worker"] shall not include individual employers, limited liability company members, partners or self-employed persons." There is nothing in the record in this claim which establishes that either Mr. Simpson or Mr. Lorson filed an election or took the other steps as described in K.S.A. 2008 Supp. 44-542a or K.S.A. 44-505(b). They, accordingly, do not fall within the definition of workman, employee, or worker and had any payments been made to them by respondent, those payments would not be included in "wages for all employees" for payroll purposes under K.S.A. 44-505(a).

In *Smith*[9] a member of the Appeals Board, on review of a preliminary hearing order, held that amounts paid to LLC members should not be considered part of respondent's payroll for purposes of determining coverage unless an election was made to provide coverage for the limited liability company members. In *Handke*,[10] also decided by a single Board member reviewing a preliminary hearing order, it was concluded that pursuant to an amendment to K.S.A. 44-542a effective July 1, 2002, a member of an LLC could only be covered under the Act when an election is filed as detailed in 542a.

A thornier potential issue is whether wages paid by respondent to members of the families of Mr. Simpson and Mr. Lorson, by either marriage or consanguinity, are properly included in respondent's payroll in determining the reasonableness of respondent's estimates that its payroll would not exceed $20,000 for all employees in calendar year 2008. In *Howard*,[11] also a review of a preliminary order, the Board Member held that respondent, an LLC, was not an individual or a partnership, and therefore monies paid to family members of respondent's owners should be included in the computation of respondent's payroll for purposes of K.S.A. 44-505. In *Hall*,[12] which did not involve an LLC, but rather a "family owned" corporation, the Board Member who reviewed the preliminary order held that since a corporation cannot have a "family by marriage or consanguinity," then under K.A.R. 51-11-6, all employees, even though related to one another, had to be counted in determining the sufficiency of payroll for coverage purposes.

Respondent is not a "regular" corporation but rather is a kind of "hybrid" business organization. Limited liability companies include only entities, such as respondent in this claim, formed under the provisions of the Kansas Revised Limited Liability Company Act.[13] A limited liability company is considered a separate legal entity,[14] so in that sense it is similar to a traditional corporation and could hence have no family by marriage, consanguinity, or otherwise. However, K.S.A. 2008 Supp. 44-508(b), K.S.A. 2008 Supp. 44-542a, and K.S.A. 44-543 seem to distinguish between corporations and limited liability companies. In this claim, it is unnecessary for the Board to decide this issue explicitly because, as detailed below, it makes no difference to the outcome of the coverage issue

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[9] *Smith v. Power Play Partners, Inc. F/K/A Power Play Partners, LLC*, No. 1,019,598, 2005 WL 1634419 (Kan. WCAB June 10, 2005).

[10] *Handke v ILC of Topeka, Inc.*, No. 1,019,159, 2005 WL 1365173 (Kan. WCAB May 31, 2005).

[11] *Howard v. Saroya, LLC*, No. 1,039,728, 2009 WL 298356 (Kan. WCAB January 26, 2009).

[12] *Hall v Knoll Building Maintenance, Inc.*, No. 1,056,687, 2011 WL 6122930 (Kan. WCAB November 29, 2011).

[13] K.S.A. 17-7662, 17-7663(f). For a brief history of limited liability companies in Kansas see *Halley v. Barnabe*, 271 Kan. 652, 660, 24 P.3d 140 (2001).

[14] K.S.A. 17-7673(b).

whether amounts paid to members of Mr. Simpson's family and Mr. Lorson's family are or are not considered as part of respondent's payroll in 2008.

The preponderance of the credible evidence establishes the reasonableness of respondent's projections of its 2008 annual payroll. There are voluminous financial records in evidence. The estimates or projections to be gleaned from that material varies somewhat depending upon which set of documents is scrutinized and the periods of time they cover. However, one conclusion remains consistent in the financial documents and the testimony, and that is there was no point in 2008 when respondent would have or could have reasonably estimated a $20,000 annual payroll, or more, for that calendar year.

Mr. Lorson was deposed on October 28, 2008. A bank statement covering the period January 1, 2008, through September 14, 2008, (the last check reflected in the bank statement was written on September 6, 2008) was offered into evidence as exhibit 4. That exhibit reveals that respondent had paid to that point in calendar year 2008 a total for labor of $5,324, which included all payments to what respondent referred to as "contract labor" and payments made to members of Mr. Simpson's family and Mr. Lorson's family. In her deposition, Mrs. Lorson, respondent's bookkeeper, testified as to each entry in respondent's check ledger, which was offered into evidence at her deposition as exhibit 1 and which covered the period from January 1, 2008, through the end of that year. She clarified and explained what each payment represented. Based on Mrs. Lorson's testimony and respondent's 2008 check ledger, the ALJ found respondent paid, excluding members of Mr. Simpson's family and Mr. Lorson's family, a total of $4,339.25 for labor costs in calendar year 2008.

Based on financial documents covering the period of January 1, 2008, through November 18, 2008, the Board calculated respondent had paid to that point about $7,464 for contract labor, which includes the wages paid to family members and outside labor.[15]

The evidence was disputed whether claimant was an employee of respondent or whether he was an independent contractor. Clearly, respondent and its two members felt claimant was "contract labor" and not an employee, full-time or otherwise. Whether a legal relationship is one of employer/employee or principal/independent contractor does not solely depend on what the parties agree to call themselves. That determination requires a more detailed analysis.[16] However, in this claim the question in 2008 of whether claimant was an employee, and whether the other people who worked for respondent were

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[15] At least two payments in this figure, $72 to Steve Zelniker and $150 paid to "Ben" may not have been payment for contract labor. Later in the check ledger, a payment is made to Mr. Zelniker for rent. Also, the check ledger identified the $150 paid to Ben as "truck work." However, in her testimony Mrs. Lorson said she was unsure of the reason those payments were made, and the Board added the payments to its calculation of "contract labor" paid by respondent in an abundance of caution.

[16] See, *e.g.*, *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

employees, is immaterial because the outcome of the coverage issue is the same regardless of how those questions are answered if, when combining the monies paid to claimant and the others who performed labor for respondent, including members of the Simpson and Lorson families, respondent did not and could not reasonably estimate an annual payroll exceeding $20,000 in 2008. Mr. Simpson and Mr. Lorson did not anticipate hiring employees and, based on that assumption, they sought and received advice from an insurance agent concerning what insurance coverage respondent should purchase. Specific inquiry of the insurance agent concerning workers compensation coverage was made by Mr. Simpson and Mr. Lorson and they were told as long as respondent kept below $20,000 in annual payroll, respondent was not required to obtain workers compensation coverage.

There is nothing in the record to suggest that respondent purchased workers compensation insurance coverage, established membership in a qualified workers compensation group-funded pool, or filed a written election with the Division. K.S.A. 44-505(b); K.S.A. 2008 Supp. 44-542a.

In his brief and at oral argument, claimant's counsel asserted that some of the financial documents provided by Mr. Simpson were false, that the correct figures had been manipulated by Mr. Simpson, and that Mr. Simpson lied under oath regarding the financial statements. The Board has carefully considered claimant's allegations that respondent called workers "contract labor" when they were actually employees and that, in doing so, respondent manipulated or falsified respondent's financial documents. However, the evidence does not support those notions, and, as stated above, even if those sums categorized as contract labor are treated as wages, the total gross payroll is still far below the $20,000 threshold.

The other issues raised by claimant are moot and will not be addressed.

Jurisdiction is described in *Allen*[17], as follows:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[18]

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[17] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[18] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

CONCLUSION

The Board finds that the parties are not covered by the Kansas Workers Compensation Act and that this claim should be dismissed with prejudice.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated February 6, 2012, is hereby modified to find that this claim is dismissed with prejudice.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
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